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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 814

RAYMOND JOSEPH DUVERNAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL LAWYERS GUILD

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Washington, D. C. · THIEL PRESS · 202 · 393-0625

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UNITED STATES OF AMERICA,
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BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL LAWYERS GUILD

INTEREST OF THE AMICUS

The National Lawyers Guild has for several years taken the lead in publishing material dealing with the rights of Selective Service registrants, arranging conferences and workshops for lawyers and lay counselors and in organizing groups of attorneys to represent indigent registrants in every way possible both before and during the institution of judicial proceedings looking to correct allegedly unlawful action by local boards and other Selective Service System entities.

The Guild's experiences have led it, as an organization, to become deeply troubled by the plight of the registrant

who must, usually unaided by counsel, find his way through the procedural labyrinth of Selective Service. The Guild has been troubled, too, that the institutions of Selective Service have not reflected the diversity of views characteristic of society as a whole, a fact documented by several recent studies which are cited in the brief that follows.

STATEMENT OF FACTS

This case is here on certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit, reported at 394 F.2d 969, 1 SSLR 3170 (5th Cir. 1968). It has been set down for argument along with *McKart v. United States*, 395 F.2d 906, 1 SSLR 3123 (6th Cir. 1968), No. 403, which raises one of the same issues, namely, exhaustion of administrative remedies as a prerequisite to judicial review in selective service cases.

DuVernay, a 23-year old Negro, is a registrant of a New Orleans, Louisiana, selective service board. There are 4092 such boards in the United States, each having jurisdiction over a county, a part of a county, or, in the case of an "intercounty local board", a number of counties.[1] The members of these boards, selected by the President upon the nomination of the appropriate Governor or comparable official,[2] are civilians who volunteer their time. They operate under regulations issued by the President and the Director of Selective Service, exempted from the hearing requirements of the Administrative Procedure Act. See § 15, Military Selective Service Act of 1967. Selective Service Law Reporter [hereinafter SSLR], *Practice Manual*, ¶¶ 31-35. In addition, the boards operate under a large body of informal regulatory and quasi-regulatory material issued by the Director of Selective Service and by the Department

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[1] Military Selective Service Act of 1967, § 10(b)(2).

[2] *Id.* This intercession of the governor may make the selection of board members "state action" within the meaning of relevant statutory and constitutional provisions.

of the Army, and sometimes very difficult to obtain in current form.[3] The System's performance is in issue in this case, as will be shown below, because of the "exhaustion of remedies" requirement for which the government successfully contended in the court below, and because of the substantial questions raised concerning the composition of the local board which ordered petitioner to report for induction. More extensive discussion of these issues appears below.

Petitioner's classification history follows a normal pattern: He was classified I-S (H) during the time he was in high school, under the mandatory provisions of § 6(i)(1) of the Universal Military Training and Service Act of 1951, subsequently re-enacted as the Military Selective Service Act of 1967 (Pub. L. 90-40, 81 Stat. 100). During his high school days, he was once mistakenly reclassified I-A, but he told the local board about the error and was placed back in Class I-S(H). He enjoyed a II-S deferment upon his matriculation at Louisiana State University in September 1965. He discontinued his studies at LSU early in 1966 and went to work as a laborer to support his mother and siblings. He was reclassified I-A (available for military service) on January 19, 1966. According to the government's response to the petition for certiorari, DuVernay secured employment "in or shortly prior to March 1966" with an antipoverty agency, the Social Welfare Planning Council. By notice dated April 13, 1966 (SSS Form 252), the local board ordered him to report for induction on May 20, 1966. Following receipt of the Order to Report for Induction, DuVernay, his mother and his employer visited and wrote to the local board to attempt to secure his deferment from service based upon his employment status and upon the hardship which his induction would cause for his mother

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[3]This regulatory material is reprinted in the *Statutes & Regulatory Material* section of the Selective Service Law Reporter, so that the Court may have an idea of its mass.

and siblings. The board consistently refused to cancel the induction order or to grant the deferments requested.

At DuVernay's trial, he attempted to demonstrate that the chairman of the local board was a leader of the United Klans of America and that the local board members had been nominated and selected in a racially-discriminatory manner, in that no Negro had served on the board for at least the past five years.

DuVernay was convicted and sentenced to five years imprisonment, well above the national average sentence; see 1 SSLR 19-20 (1968), and the maximum possible under § 12 of the Military Selective Service Act.

ARGUMENT

I.

DUVERNAY IS NOT FORECLOSED FROM OBTAINING JUDICIAL REVIEW BY VIRTUE OF A FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

A. General

The term "exhaustion of remedies" in the Selective Service law of judicial review has two meanings, only one of which has been considered by this Court. The requirement that generally a registrant must go to the "brink of induction" as a prerequisite to obtaining judicial review of claimed errors in the classification process, considered this Term in *Clark v. Gabriel*, 392 U.S. ___, 1 SSLR 3220 (1968), and resting upon cases dating to *Estep v. United States*, 327 U.S. 114 (1946), and before, is sometimes termed an "exhaustion" requirement, but may more accurately be denominated a question of "ripeness". The rationale of such cases as *Gabriel* and *Estep* is that "litigious interruption" of the selection process is not lightly to be countenanced, and that the registrant must make every effort to spare the courts the burden of reviewing his claim by giving the military every possible chance to reject him.

There is no question of "ripeness" here, for DuVernay went to the brink of induction.

The other question of "exhaustion" may more properly be so denominated. Generally, the courts have required that a registrant take administrative appeals open to him within the Selective Service System before coming to court to challenge the classification he is given.[4] This requirement serves one of the same policy considerations as the "ripeness" rule of *Estep* and *Gabriel,* for it ensures the "many cases that would otherwise be litigated never actually reach the courts." *Lockhart v. United States,* ___ F.2d ___, 1 SSLR 3204 (9th Cir. 1968), set down for rehearing *en banc* Jan. 20, 1968. More than this, however, the exhaustion rule is a rule of deference of "special expertise" and "administrative judgment".[5] The "ripeness" rule does not fulfill this function, for one may go to the brink of induction without exhausting administrative appeals along the way, and one *must* go to the brink of induction even though most administrative procedures which remain to be exhausted after an unsuccessful appeal in the Selective Service System are not relevant to and do not permit one to raise claimed denial of a classification lower than I-A. After an unsuccessful appeal in the Selective Service System, the procedures which remain have rather to do with physical, mental and moral qualifications, and are administered by the Army rather than the Selective Service System. See SSLR, *Practice Manual,* ¶¶ 1108-19, Army Regulation 601-270 (Induction Center Processing) (reprinted at SSLR 2227 *et seq.*).

With this short discussion as a preface, we turn to a discussion of the "exhaustion of remedies" requirement.

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[4] The case law is summarized in *United States v. McKart,* 395 F.2d 906, 1 SSLR 3170 (6th Cir. 1968).

[5] *Wills v. United States,* 384 F.2d 943 (9th Cir. 1967), *cert. denied,* 391 U.S. ___ (1968).

The exhaustion requirement has been applied with almost unvarying harshness by the district courts and courts of appeals until rather recently.[6] However, in *Donato v. United States*, 302 F.2d 468 (9th Cir. 1962), the court held out a "particular circumstances" test for relaxation of the rule. In *Wolff v. Selective Service Bd.*, 372 F.2d 817 (2d Cir. 1967), the court held that the registrants need not have exhausted remedies where to do so would have been futile. In *Wills v. United States*, 384 F.2d 943 (9th Cir. 1967), *cert. denied*, 391 U.S. ___ (1968), the court held that the registrant was excused from the requirement that he exhaust administrative remedies because: first, his punitive reclassification raised a constitutional issue upon which "courts have little reason to defer to administrative determination"; and, second, the board had misled the registrant concerning his selective service status, and the misleading could have contributed to his decision not to appeal. *Wills* was followed in *United States v. Carson*, 282 F.Supp. 261, 1 SSLR 3046 (E.D. Ark. 1968), the court holding that a registrant was excused from taking an appeal in a case involving a local board error of constitutional magnitude.

And, in *Lockhart v. United States*, ___ F.2d ___, 1 SSLR 3204 (9th Cir. 1968), cited *supra*, the court held that a conscientious objector applicant was excused from the exhaustion requirement:

> "There is nothing in the Selective Service laws or regulations that precludes a defendant indicted for a criminal violation of the Selective Service law from attacking the jurisdiction of the Draft Board unless he has first exhausted all administrative remedies. The rule of exhaustion is a court-made rule.
>
> "We think that this is an appropriate case for relaxing the rule.
>
> "To hold otherwise would be to deny to this defendant, indicted for a criminal offense, the

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[6] See *McKart, supra* note 4.

> opportunity to offer proof of the only defense that he has on the flimsy excuse that he did not take certain procedural steps in a complex administrative proceeding, in the face of uncontradicted evidence that he did not understand what an "appeal" was, and that he was not told and did not know the consequences of his failure to seek administrative review. After all, the Supreme Court no longer adheres to the proposition that everyone is presumed to know the law. See *Lambert v. California*, 355 U.S. 225 (1957). To hold otherwise would be wholly inconsistent with decisions of our Supreme Court which have gone so far in recent years to bring more equal justice to the young, the poor, the uneducated, and the uncounseled."

So, it may fairly be said, the Court confronts the exhaustion requirement in the face of recognition by lower courts of at least three exceptions: futility, constitutional law and ignorance. These exceptions are analogous to well-established rules in other areas of the law of judicial review. The example which most immediately comes to mind is that of federal *habeas corpus* for state prisoners. This Court's development of exhaustion rules designed to do deference to state courts while protecting the federal rights of state criminal defendants has been the subject of more legal writing than almost any other single subject of this Court's attention. And *Fay v. Noia*, 372 U.S. 391 (1963), and *Townsend v. Sain*, 372 U.S. 293 (1963), this Court's most recent major expressions of view, have been celebrated and damned with equal vigor. But *Fay* expresses a view of waiver and exhaustion which is appropriate here, for it places stringent limits upon the rule, which reached its zenith in *Darr v. Burford*, 339 U.S. 200 (1950), that unless a state prisoner (often unaided by counsel) exhausted *all* his remedies in a timely manner he might forever be barred from federal *habeas corpus*. *Fay* overturned *Darr* and held that a state prisoner would not be foreclosed, on "exhaustion of remedies" grounds, from federal *habeas* except upon the basis of a "knowing" waiver of his state remedy:

> "If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court . . . to deny him all relief. . . . At any event we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner." 372 U.S. at 439.

The "deliberate bypass" rule was elaborated upon in *Henry v. Mississippi*, 379 U.S. 443 (1965), in which the Court remanded a state criminal conviction for a determination whether there had been a "deliberate bypass" of the state's contemporaneous objection rule, thus foreclosing federal review of Henry's contention that his conviction had been obtained with the use of "tainted" evidence.

It need not, of course, be said that *Fay* and *Henry* reflect a return to the waiver rule of *Johnson v. Zerbst*, 304 U.S. 458 (1938), and are part of a consistent pattern of recent decisions which make a clear finding of intentional relinquishment prerequisite to a holding that a litigant has waived a federal right. See, *e.g.*, *Brookhart v. Janis*, 384 U.S. 1 (1966) and *Miranda v. Arizona*, 384 U.S. 436 (1966). See also Comment, 54 Calif. L. Rev. 1262 (1966), for a valuable discussion of the issues. These cases appear to rest upon a frank recognition that most defendants in criminal cases (even granting that after *Gideon*[7] most litigants will have counsel to help them) are unaware of the technical details of substantive and procedural law which rule their cases. Does this rationale apply to the case before the Court? An analysis of the Selective Service System suggests that it does.

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[7] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

B. The Selective Service System: An Administrative Obstacle Course[8]

The System, governed by a vast quantity of formal and informal regulatory material, see Right of Counsel in the Selective Service System, Hearing Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, May 16, 1968 [hereinafter *Hearings*], at 33 (statement of Sen. Kennedy), 94-99 (statement of Michael E. Tigar), affects millions of young men. Yet, its operation is a mystery to most registrants,[9] to many clerical employees,[10] and even to the very people who are designated to advise registrants as to their rights—the volunteer government appeal agents.[11] Desultory attempts have been made to remedy this situation: General Hershey started a series of informative memoranda to government appeal agents but has apparently given up after sending four extremely sketchy mimeographed discussions of a few marginal points. Selective Service System, Memoranda to all Government Appeal Agents (1967-68). As late as July 24, 1967, General Hershey confessed in a letter to local baords that "in many instances" the little four page folder "Selective Service and You" (outlining the System's procedures extremely sketchily—reprinted at *Hearings*, pp. 44-47) was not being given out to registrants as it should be. Operations Bulletin No. 308 (reprinted at SSLR 2200:58). At the very time of DuVernay's contact with the System, the

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[8] This title is drawn from a Comment by Charles Wilson, based upon field research into the operations of the Selective Service System and published at 54 Calif. L. Rev. 2123 (1966).

[9] *See, e.g., Petersen v. Clark,* 1 SSLR 3241 (N.D. Calif. 1968).

[10] *See, e.g., Striker v. Resor,* 1 SSLR 3019 (D.N.J. 1968) (board clerk misadvice to registrant).

[11] National Advisory Comm'n on Selective Service, In Pursuit of Equity: Who Serves When Not All Serve? 28-29 (1967), documenting the lack of knowledge on the part of appeal agents of the law of selective service. *See also Hearings, passim.*

Marshall Commission was documenting a searing indictment of the System's failure to inform registrants of their rights.[12]

Perhaps this apparent lack of concern is understandable, for General Hershey is fond of saying that registrants have no rights except the right to do military service—all else is legislative or administrative grace. Hershey, *The Selective Service System,* Current History, July-August, 1968, p. 3. That this view does not fit well with current constitutional theory[13] does not appear to perturb the Director or his local boards. A detailed statistical study has shown that board members attitudes are not those which one has a right to expect of adjudicative officials in the federal system. See, generally, Davis & Dolbeare, *Little Groups of Neighbors* (1968).[14]

How are we to govern such a system, so that it is in the words of § 1 of the Military Selective Service Act, "fair and just"? Some had thought that preinduction judicial review would do the job. But compare *Clark v. Gabriel,* 392 U.S. ___, 1 SSLR 3220 (1968) with *Oestereich v. Selective Service System,* 392 U.S. ___, 1 SSLR 3215 (1968). Some had for a moment hoped that fair administrative procedures—the "judicialization" of the System, would come about in the 90th Congress. *But see* 1 SSLR 3, 12 (1968). After the Marshall Commission reported,[15] some had pointed out that the President could with a stroke of the pen require every registrant to be given a booklet like that sent every taxpayer

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[12]Nat'l Advisory Comm'n on Selective Service, *supra.*

[13]For a general survey; *see* Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector,* 39 Wash. L. Rev. 4 (1964).

[14]The authors of this book were consultants to the National Advisory Comm'n on Selective Service, and their work is the most exhaustive study to date of local board conduct, attitudes, and prejudices.

[15]Note 11, *supra.*

every year with his Form 1040. But nothing happened, even though such regulations can be made merely by publishing them in the *Federal Register*.

Now, to cap this System with a rule which treats the Selective Service appeals process not as a means to correct errors but as set with springes for the registrant when he finally does seek judicial review is unwise and unfair. The way must be open for thrusting back onto the System the responsibility for informing registrants, by permitting judicial review even where the registrant has not exhausted his remedies, unless it is shown he deliberately bypassed them.

The government has, it is true, argued that the notice of right to appeal on the back of each notice of classification is enough notice to call for a "deliberate bypass" conclusion in every case. It is respectfully suggested that few state courts would hold a restaurant patron or parking lot customer to such a stringent standard of taking notice when the issue is the loss of a checked garment or a bent fender. See *Klar v. H. & M. Parcel Room*, 296 N.Y. 1044, 73 N.E. 2d 912 (1947). It seems, therefore, peculiarly inappropriate for the government to insist upon this rule under these circumstances.

When this cursory notification is contrasted with the detailed and insistent demands which the Internal Revenue Service makes on the delinquent taxpayer,[16] the government's contention seems little short of preposterous.

Similarly, one may argue recognized that exhaustion of remedies should not be required when to do so would be futile.

The "constitutional issue" exception and the "error of law" exception posed in *McKart* and the cases upon which McKart's claim rested in the court of appeals raise more difficult problems. (However, for *McKart*, it is clear that the

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[16] See Surrey & Warren, Federal Income Taxation 54-70 (1960 ed.) (note on income tax procedure).

statutory exemption to which he was entitled, that of a sole surviving son, provides that he "shall not be inducted". § 6(o), Military Selective Service Act of 1967. Hence, the rule of *Oestereich v. Selective Service System*, 392 U.S. ___, 1 SSLR 3215 (1968), would entitle him to raise his claim despite his having failed to follow administrative procedures established by regulation.) Constitutional claims and claims resting upon the failure of the System to follow its own procedural and substantive rules ought to be reviewed, it seems, even though the registrant has not exhausted his remedies. Of course, the failure of the System to follow statutory provisions or its own administrative regulations raises constitutional question. *Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959). The justification for thus relaxing the rule is found in *Wills v. United States*, 384 F.2d ___ (9th Cir. 1967), *cert. denied*, 391 U.S. ___ (1968).

C. Conclusion

For the reasons set forth above, it appears that DuVernay should not be foreclosed from judicial review by virtue of his failure to take an administrative appeal.

II.

THE APPLICATION OF THE PRECLUSION PROVISIONS OF 32 C.F.R. 1625.2.

32 C.F.R. § 1625.2 provides that a board may not reopen the classification of a registrant after issuance of an order to report for induction unless it first specifically finds that there has been a change in status resulting from circumstances beyond the registrant's control.

While it is true that this provision has been held valid as a means of precluding late-raised claims, *e.g.*, *United States v. Gearey*, 368 F.2d 144 (2d Cir. 1966), these decisions are by no means conclusive upon the issue before the court.

First, there remains an issue whether 1625.2 means, as the government has asserted, that *any* claim raised after

issuance of an order to report for induction is barred unless the registrant recites—and the board finds—that some tangible change has occurred, in his condition of health or pattern of life, which resulted from no act of volition upon his part. A broken leg, a pregnant wife (See *Talcott v. Reed*, 217 F.2d 360 (9th Cir. 1954)), and a sudden promotion into a new and more important job potentially deferable under 32 C.F.R. §§ 1622.22-22.23, are perhaps examples of what the government has in mind.

But why read the regulation thus narrowly? Consistent with the argument raised in Part I, it is wise to read the inartful words of § 1625.2 as meaning that the registrant is foreclosed from raising his claim if, and only if, his failure to raise it prior to issuance of the Order to Report for Induction resulted from a deliberate bypass of the orderly preinduction procedures for raising claims. As may be seen from the analysis above, no such conclusion can be reached in the general run of Selective Service cases, at least until the System takes seriously its public information responsibilities. See *Petersen v. Clark*, 1 SSLR 3241 (N.D. Calif. 1968) (holding that where a registrant's late filing of a CO application was caused by failure to understand the law of conscientious objection).

Indeed, there is some question whether § 1625.2 will withstand constitutional scrutiny if construed any more broadly than as a "deliberate bypass" proviso. See Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 Calif. L. Rev. 1262 (1966). The discussion of "competence" and "personal participation" appears above in Part I of this brief. On the score of "legitimate interest", it is useful to note that § 1625.2 was originally issued in December of 1941, after the nation had been plunged into war by the events at Pearl Harbor. The new provision read that reopening could not be granted after issuance of an order to report for armed forces physical except on a showing of change in status beyond the reigstrant's control. In 1942, the regula-

tion was amended to its present form, making the cutoff date the issuance of an order to report for induction. Selective Service System, *Selective Service Regulations*, 301 (3d ed., 1st printing 1944). Thus, the "interest" served was an absolutely critical national need for total and rapid mobilization. Now, 27 years later, the justification for a rigorous insistence upon a registrant, at his peril, knowing all the regulations and procedures and using them to gain deferment before an induction order is issued, is rather more attenuated.

III.

REOPENING OF A REGISTRANT'S CLASSIFICATION

The concept of "reopening" is essential to the understanding of this case. When the appellate process is terminated, or at any time when there come into light facts which might justify a change in the registrant's classification, the local board may be prevailed upon to reopen the registrant's classification and classify him anew. If new facts come to the board's attention, it may of its own motion reclassify the registrant. The discussion which follows sets out the reopening procedure provided in the regulations. 32 C.F.R. Part 1625.

Reopening is accomplished by any of three means: First, if the registrant, a person claiming to be a dependent, a person who has on file a request for occupational deferment of the registrant, or a government appeal agent should file a request in writing setting out facts which, if true, would justify reclassification, or if the board of its own motion decides that such facts exist, then the board *may* reopen. In either event, the board may not reopen after mailing an order to report for induction or for civilian work unless it finds that there has been a change in the registrant's status resulting from facts over which he had no control. 32 C.F.R. § 1625.2. Second, if the State Director or National Director requests reopening, the board *must* reopen. 32 C.F.R. § 1625.3(a). Finally, if the board receives facts that

one ordered to report for induction is entitled to a I-S(C) classification, it must cancel the order and place him in that classification. 32 C.F.R. § 1625.3(b). A reopening by a local board cancels any outstanding order to report for induction or for civilian work except that if the registrant has failed to comply with either of these orders, reopening for the purpose of placing him in Class V-A (over age) or IV-C (alien) will not cancel the order with which he failed to comply. 32 C.F.R. § 1625.14. Of course, the order may be of no effect in any case because based upon an improper classification into I-A or other deficiency.

Crucial to the concept of "reopening" is "classification anew". When the board reopens a registrant's classification and reconsiders his case, it is considered to have classified anew, and all the procedural consequences which attach to an initial classification attach well to such an action. The registrant has the same rights of personal appearance and appeal that he had at the time the board first classified him. 32 C.F.R. §§ 1625.11-25.13. The board must mail a new notice of classification to the registrant, and new advices of classification to all those having on file current requests for his deferment, as soon as practicable after reopening the registrant's classification. 32 C.F.R. § 1625.12.

If reopening is not mandatory, the board may, under 32 C.F.R. § 1625.4, decline reopening and send out a letter to the person requesting the reopening noting its action. No other information need be sent out under the regulations, and the registrant himself may not be aware of the board action if the reopening was requested by someone other than himself—his employer or a dependent, for example.

The board's discretion is absolute under the regulations.[17] Ostensibly, it may reconsider the registrant's entire file and not give him a personal appearance or appeal from its action by the simple expedient of not reopening, whereas if it were to reopen, the registrant would have a personal

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[17] See 32 C.F.R. § 1625.4.

appearance and an appeal even if the board retained him in the same class.[18] The possibilities for abuse of such a system have led to judicial checks upon it.

If a registrant sends to his board information in support of reopening which makes out a *prima facie* case for placement in the classification he claims, the board has been held to be required to reopen.[19] If the registrant seeking reopening is in class I-A, failure to grant reopening and all its attendant procedural rights of personal appearance and appeal invalidates the board's order to report for induction.[20] As an alternative basis for judicial review of board action, courts have held that if the board receives the registrant's proffered claim and actually inquires into the merits

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[18] 32 C.F.R. § 1625.11.

[19] Miller v. United States, 1 SSLR 3014, 388 F.2d 973 (9th Cir. 1967) (Form 150 presented facts which, if true, would justify a change in the registrant's classification, hence board erred in not reopening; conviction based on continuance in I-A status reversed); Stain v. United States, 235 F.2d 339, 342 (9th Cir. 1956) (semble); United States v. Freeman, 1 SSLR 3012, 388 F.2d 246 (7th Cir. 1967) (semble; court underscores denial of reopening is also denial of right to appeal denial of claim for classification); United States v. Majher, 250 F. Supp. 106 (S.D.W.Va. 1966) (board must have basis in fact to deny reopening); United States v. Burlich, 257 F. Supp. 906 (S.D.N.Y. 1966) (semble); United States v. Ransom, 223 F.2d 15 (7th Cir. 1955) (prima facie case for IV-D classification requires reopening; failure to reopen voids induction order); Olvera v. United States, 223 F.2d 880 (5th Cir. 1955) (semble); Townsend v. Zimmerman, 237 F.2d 376 (6th Cir. 1956) (prima facie case for III-A requires reopening; injunction issued). But note that the request for reopening must be made as such, *e.g.*, United States v. Monroe, 150 F. Supp. 185 (S.D. Calif. 1957), although there is strong authority that a mere letter stating that one has grounds for exemption must be treated as a request for reopening. United States v. Stafford, 1 SSLR 3040, 389 F.2d 215 (2d Cir. 1968).

[20] The authorities cited, Note 19 *supra*, stand for this proposition. An induction order becomes void after issuance if the board "loses jurisdiction" through arbitrary failure to reopen.

of his classification, it cannot shut off review of its action by refusal to reopen.[21] Reopening will be "deemed" to have occurred,[22] and the board's failure to provide notice of personal appearance and appeal rights following its action will, if the registrant is in Class I-A at the time of the refusal, invalidate a subsequent order to report for induction.[23] See 32 C.F.R. § 1625.3(a).

The board must, under the prevailing view, reopen when facts are presented to it making out a *prima facie* case for reclassification. This Court has never held that there are limits upon the discretion of a board to deny reopening, but the consistent course of decision by the courts of

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[21] This approach is suggested in Miller v. United States, *supra*, note 19, at 976-77. There the court held that the board had actually reached and considered the merits of the registrant's I-O claim, and that it could not so do unless it formally reopened his classification with all the attendant rights of personal appearance and appeal. The court held that inquiry into the merits of a classification without formal reopening denied the registrant due process, not only in that a fair hearing was not granted, but in that the board was in effect discriminating between those registrants whose claims it reopened and those whose claims it considered on the merits without reopening. In United States v. Vincelli, 216 F.2d 681 (2d Cir. 1954), the court found that the board had actually inquired into the merits of the registrant's IV-D claim and thus had in fact reopened his classification even though its action was noted in the board minutes as a denial of reopening. Having found a de facto reopening, the court held the board erred in not sending the registrant a new notice of classification informing him of his right to appeal. Reopening was "deemed to have occurred" in United States v. Baker, 1 SSLR 3017 (E.D.N.Y. 1968), because the board did in fact inquire into the merits of the registrant's claim; thus the board error was in not cancelling the outstanding order to report for induction as required by § 1625.14 and not giving the registrant the rights of personal appearance and appeal as required by 32 C.F.R. § 1625.11.

[22] United States v. Baker, *supra* note 21.

[23] *See* cases cited *supra* note 21.

appeals which have considered the matter is not lightly to be ignored. It is important to recall in this connection that the board is not free to deny requests for reclassification because it believes that it has a basis in fact for doing so. The "basis in fact" standard is a criterion governing judicial review, not the standard to be applied by the board in judging applications for reopening. See *Woodby v. I&NS*, 385 U.S. 276 (1966). The board *must*, under one view, reopen unless the application for deferment or exemption is "frivolous", see *Miller v. United States*, 388 F.2d, at 976, or if he makes out a "prima facie case", *United States v. Freeman*, 388 F.2d 246, 1 SSLR 3012 (7th Cir. 1967). In a case involving a dependency deferment, such as DuVernay's the board's reopening gives the registrant an opportunity to appear and discuss his family situation in accordance with the standards for dependency. See SSLR, *Practice Manual*, ¶ 1061. And an occupational deferment claim is aided by reopening since not only the local board, but an Advisory Committee created by the State Director of Selective Service, can consider whether the registrant's occupation is necessary to the national health, safety and interest, or whether he fulfills some community need. See 1 SSLR 25; SSLR, *Practice Manual*, ¶ 1054; 32 C.F.R. §§ 1622.22-22.23; Local Board Memorandum 95.

IV.

THE RACIAL COMPOSITION OF LOCAL BOARDS.

"Reorganized in 1915, this Ku Klux Klan was flourishing again by 1919. Its program 'for uniting native-born white Christians for concerted action in the preservation of American institutions and the supremacy of the white race', was implemented by flogging, branding with acid, tarring and feathering, hanging and burning." Report of the National Advisory Commission on Civil Disorders, p. 219.

As the record in this case indicates, petitioner's trial counsel sought to question a government witness as to

whether the chairman of the local board at the time of the events in question was an official of the United Klans of America. And an attack was also made upon the local board's actions based upon the uncontested fact that for the past five years no Negro has sat upon the petitioner's board.

As the Court is aware, the system of selection which the Congress has mandated is to be "fair and just", and the selective service regulations contain an explicit "nondiscrimination" provision. And while the System's officials have protested that draft board proceedings are not "a lawsuit", see *Hearings* at 31, they are clearly adjudicative in the accepted sense of the term.

Therefore, it seems passing strange to say, as the Fifth Circuit has done, *e.g.*, *Clay v. United States*, 1 SSLR 3088 (5th Cir. 1968), *cert. pending*, that local boards invalidly constituted in the sense of being selected in a racially discriminatory way are like malapportioned legislatures, and their decisions are valid though their composition may be challenged (if § 10(b)(3) of the Military Selective Service Act is not at bar, see *Boyd v. Clark*, ___ U.S. ___, 1 SSLR 3287 (1969)) by a civil suit.

Racially discriminatory selection policies produce a board which appears to registrants to represent, and, bearing in mind one rationale of the jury selection cases, has a high probability of reflecting, the prejudices and hostilities which the dominant white community in the South bears toward the black community. This point is underlined in this case by the exclusion of evidence concerning Klan activity by the board chairman. Just this term, this Court insisted that arbitrators under the Federal Arbitration Act must be as free as judges from implied bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, U.S. , 37 U.S.L.W. 4037 (1968). Ought the same principle to apply to local boards? The amicus suggests that it should.

CONCLUSION

For the foregoing reasons, the amicus respectfully suggests that the conviction in this case should be reversed.

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